

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2021/0002

BETWEEN:

PALMAVON J. WEBSTER

Appellant

and

[1] WDM LIMITED

[2] JOHN O. DYRUD

(as a shareholder and director of WDM Limited)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Sydney A. Bennett, KC

Justice of Appeal [Ag.]

Appearances:

Ms. Tana'ania Small Davis KC for the Appellant.

Ms. Jean M. Dyer with her Ms. Liska Hutchinson for the Second Respondent.

No appearance for the First Respondents.

2022: February 8;

2023: March 22.

Civil appeal – Exercise of judge’s discretion to grant a petition for the winding up of a company - Winding up of company on just and equitable grounds – Quasi-partnership company – Whether company was a quasi-partnership company - Liability for indebtedness — Whether there has been a breakdown in trust and confidence between shareholders of company that justifies the winding up of company – Deadlock in relation to application of proceeds of the policy of insurance - Whether substratum of company no longer existed – Alternative remedy – Burden of proof in showing the existence of an alternative remedy

Prior to June 1999, the appellant ("Ms. Webster") and the second respondent ("Mr. Dyrud") carried on a law practice in partnership with each other under the name Webster and Dyrud ("the WDM Partnership"). On 11th June 1999, the partnership incorporated WDM Limited. Ms. Webster and Mr. Dyrud are the only shareholders and directors of WDM Limited and each hold a 50% shareholding in the capital of the company. WDM Limited was formed for the purpose of acquiring and holding property as nominee for the WMD Partnership through which Mr. Dyrud and Ms. Webster could indirectly enjoy the benefits of ownership and control of land in Anguilla. In furtherance of that purpose, WDM Limited acquired the property registered as East Central Block 89319B Parcel 55 ("Parcel 55" or "the Property"), which is the only asset it owns. The premises known as Mitchell House is situated on the Property.

After the acquisition of the Property, the partnership became known as Webster Dyrud Mitchell ("WDM"). On or about September 2005 the parties as partners in the WDM Partnership jointly borrowed US\$450,000.00 from First Caribbean International Bank (Barbados) Limited ("FCIB"), by way of refinancing, for the benefit of WDM ("the 2005 Loan"). This facility was secured by a charge on Parcel 55. It was also secured by a policy of insurance which was assigned to FCIB in accordance with the terms of the refinance agreement.

The business relationship between Ms. Webster and Mr. Dyrud began to deteriorate in or about late 2006 and in or about May 2007 Mr. Dyrud withdrew from the WDM practice. The parties attempted mediation which failed and eventually the parties had recourse to binding arbitration to resolve their disagreements.

At the arbitration hearing, Mr. Dyrud pointed out that in or about 2008, after his retirement from the WDM Partnership, additional loans to the sum of US\$450,000.00 were secured by a charge on Parcel 55. The arbitrator had been specifically called upon to address and resolve the issue of the liability of the respective partners for the repayment of debts purportedly incurred for the benefit of the WDM Partnership and secured by charges on the property of related entities such as WDM Limited subsequent to Mr. Dyrud's retirement in 2006. In its award, the Tribunal held that Mr. Dyrud's liability was proscribed by virtue of clause 1.3 of the Partnership Withdrawal Agreement ("PWA") which the Tribunal held to be enforceable.

Mitchell House was extensively damaged as a result of the passage of Hurricane Irma in September 2017. A claim was made on the policy of insurance covering the premises which was eventually settled for the sum of US\$241,371.89. The parties were unable to agree on the manner in which the proceeds of the policy of insurance over the Property was to be

applied with Ms. Webster proposing that the money be used to pay down the debt of the former WDM Partnership to FCIB. Mr. Dyrud maintained that WDM Limited's assets cannot properly exist for the purpose of discharging what is ostensibly the indebtedness incurred and/or assumed by Ms. Webster and Webster LP. He proposed that the insurance proceeds be used to repair Mitchell House.

Mr. Dyrud eventually petitioned the court for the winding up of WDM Limited. The court determined that in the circumstances shown, it was just and equitable to order the winding up of WDM Limited. The learned judge accordingly granted the petition and ordered that a liquidator be appointed for the purpose of dissolving WDM Limited. In so doing, the learned judge found that WDM Limited was in substance, a quasi-partnership company and rejected the proposition that liability for the debt secured by a charge on Parcel 55 attached to WDM Limited. The court also held that the encumbrances created over the Property were incurred for the use and benefit of the WDM Partnership and that liability for the existing debts of that partnership lay with Ms. Webster only. The learned judge also held that it was just and equitable to order the winding up of the company because the relationship of mutual trust and confidence was now virtually non-existent, that the parties were deadlocked in respect of the application of the proceeds of the policy of insurance and that the substratum upon which WDM Limited stood no longer existed.

Dissatisfied with the decision of the learned judge, Ms. Webster appealed on four grounds. The following issues were for determination before this Court: 1) whether WDM Limited was a quasi-partnership company; 2) whether there had been a breakdown in trust and confidence between the shareholders of the company and if so, whether on the present facts such a breakdown could be sufficient to justify a winding up of the company; 3) whether the fact that the parties were deadlocked on the question of the application of the proceeds of the policy of insurance could be sufficient to justify an order for the winding up of the company; 4) whether the substratum of the company continues to subsist; and 5) whether there were any alternative remedies available to Mr. Dyrud.

Held: dismissing the appeal with costs of the appeal to be paid by the appellant to the second respondent, such costs to be assessed if not agreed within 28 days of the date of this judgment, that:

1. The most important consideration in determining whether a company is a quasi-partnership is the requirement that there be an association formed or continued on the basis of a personal relationship, involving mutual confidence. The requirement that there exists a relation of mutual confidence has been described as being the necessary 'substratum' of the equitable considerations

present in a quasi-partnership. In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, courts should focus on the substance, not the form, of the parties' relationship. In this case, the common intention and understanding of Mr. Dyrud and Ms. Webster was to carry on the business of operating a law practice in partnership with each other using corporate vehicles, to facilitate the operation of the partnership and of any businesses which they operated in connection therewith. WDM Limited was one such corporate vehicle; its purpose was to hold the Property at which premises the offices of the law firm and other ancillary operations of the partnership were located. It was therefore clearly a quasi-partnership company because it was an association continued on the basis of a personal relationship, involving mutual confidence or understanding. In the circumstances, the learned judge was correct in finding that WDM Limited was and had been operated by the parties as a quasi-partnership company.

Lau v Chu [2020] 1 W.L.R. 4656 applied; **Re Edwardian Group** [2018] EWHC 1715 considered; **Croly v Good** [2011] B.C.C. 105 considered.

2. A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. Firstly, a winding up may be ordered to resolve a functional deadlock which is the inability of members to co-operate in the management of the company's affairs. This leads to the inability of the company to function at board or shareholder level. Secondly, where a company is a corporate quasi-partnership, what matters is the relationship between the quasi-partners, and the extent to which the necessary basis of trust and confidence has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant. Accordingly, the Court rejected the argument that the evidence before the court below concerning the breakdown in the relationship of trust and confidence between Ms. Webster and Mr. Dyrud could not be sufficient to justify the court granting an order for the winding up of the company on the just and equitable ground.
3. In circumstances where shareholders in a quasi-partnership company are unable or unwilling to agree upon important or consequential aspects of the company's business or affairs, whether by reason of the breakdown of trust or confidence or some other reason, the court may take that reason into account in deciding whether to wind up the company on the just and equitable ground. In the present case the inability of the two shareholders of WDM Limited to come to a decision upon an important and

consequential matter such as whether damage to the sole property of the company should be repaired using the proceeds from insurance to cover such damage, or whether the funds should be used for another purpose, is indicative of a deadlock in the management of the company in that, the shareholders are unable to agree on important aspects of the company's business, assets and affairs. This circumstance could well justify a decision to wind up a corporate quasi-partnership on the just and equitable ground.

Lau v Chu [2020] 1 W.L.R. 4656 applied.

4. In arriving at his conclusion that the substratum of WDM Limited had gone, the judge found that that company had been incorporated with the intention and on the understanding that it would be used as a vehicle to acquire and hold the Property for the benefit of the WDM Partnership which involved the understanding that the Property would be available to secure needed financing for the WDM Partnership. It was no longer possible for the company to fulfill this purpose because the WDM Partnership had been dissolved. After the dissolution, WDM Limited had been repurposed to provide that facility to Webster LP the successor to the WDM Partnership. To that extent its substratum had gone, because WDM Limited could no longer serve the principal purpose for which the quasi-partners had agreed to use it.
5. The legal burden of proof is on the petitioner to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available. If the petitioner can so establish, then the legal burden of proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up. In this case, Mr. Dyrud has shown satisfactorily that the WDM Limited is a corporate quasi-partnership and that an irretrievable breakdown in trust and confidence has occurred between its members. He has also shown that the parties are irreconcilably deadlocked on an issue of vital concern of the company and that the substratum of the company has gone. In all the circumstances, Mr. Dyrud has shown an entitlement to some form of relief. The only alternative remedy suggested by Ms. Webster's counsel is that it was open to Mr. Dyrud to realize his investment by selling his shares on the open market. In considering this issue, the court expressed the view that the sale of his shares on the open market is not a viable option open to Mr. Dyrud since the only asset owned by WDM Limited is heavily encumbered particularly with respect to debts that Ms. Webster is personally liable for. Given the evidence

placed before him this is a conclusion which the learned judge was well entitled to arrive at, and this Court will not interfere.

JUDGMENT

- [1] **BENNETT JA [AG.]**: This is an appeal by Ms. Palmavon Webster (“Ms. Webster”) against the decision of Innocent J (“the learned judge”) in the high court to order the winding up or liquidation of the first respondent company, WDM Limited upon the application of the second respondent Mr. John O. Dyrud (“Mr. Dyrud”) as petitioner.

Factual background

- [2] Prior to June 1999, Ms. Webster and Mr. Dyrud carried on a law practice in partnership with each other under the name Webster & Dyrud (“the WDM Partnership”). On 11th June 1999, the partnership incorporated WDM Limited (or “the Company”). Mr. Dyrud and Ms. Webster are the only shareholders and directors of WDM Limited. They each hold a 50% shareholding in the capital of the Company.
- [3] WDM Limited was formed for the purpose of acquiring and holding property as nominee for the WDM Partnership through which Mr. Dyrud and Ms. Webster could indirectly enjoy the benefits of ownership and control of land in Anguilla. In furtherance of that purpose, WDM Limited acquired the property registered as East Central Block 89319B Parcel 55 (“Parcel 55” or “the Property”). The premises known as Mitchell House which, *inter alia*, accommodated the offices of First Anguilla Trust Company Limited (“FATCL”) and the law offices of the partnership, is situated on that Property. Parcel 55 is the only asset owned by WDM Limited.
- [4] Ms. Webster described the business model employed by Mr. Dyrud and herself as involving the employment of companies to hold

assets. She stated that as part of their business structure, all financial transactions were processed through the law firm and that it was not uncommon for the parties to provide personal guarantees or use personal assets as security for loans accessed by the law firm and/or corporate entities in which they were shareholders.

- [5] After the acquisition of the Property, the partnership became known as Webster Dyrud Mitchell ("WDM"). The written partnership agreement provided for a fixed term for the partnership expiring 31st December 2002 but after that date, the partnership continued as a partnership at will. On or about September 2005, the parties, as partners in the WDM Partnership, jointly borrowed US\$450,000.00 from First Caribbean International Bank (Barbados) Limited ("FCIB"), by way of refinancing, for the benefit of WDM ("the 2005 Loan"). This facility was secured by a charge on Parcel 55. It was also secured by a policy of insurance which was assigned to FCIB in accordance with the terms of the refinance agreement.
- [6] The business relationship between Ms. Webster and Mr. Dyrud began to deteriorate in or about late 2006. The disputes were in relation to the WDM Partnership, FATCL, and related entities such as WDM Limited and Sea-Island Realities Limited ("SIRL"). Discussions took place between them resulting in an agreement that Mr. Dyrud would retire from the WDM Partnership on terms which were reduced into writing but not signed. In or about May 2007, Mr. Dyrud withdrew from the WDM practice.
- [7] The parties attended private mediation in Miami in December 2013, but were unable to settle their differences. Ultimately, the parties had recourse to binding arbitration to resolve their many disagreements.

- [8] At the arbitration hearing, Mr. Dyrud pointed out that in or around 2008, after his retirement from the WDM Partnership an overdraft facility in the sum of US\$250,000.00 was added to the 2005 Loan and that in that same year an additional loan of US\$200,000.00 for 'business development' had been obtained by the WDM Partnership and secured by a charge on Parcel 55.¹ He requested that in delivering the award, the arbitrator should determine and quantify the extent of his liability for any debt incurred following his *de facto* retirement from the partnership.² Accordingly, the arbitrator had been specifically called upon to address and resolve the issue of the liability of the respective partners for the repayment of debts purportedly incurred for the benefit of the WDM Partnership and secured by charges on the property of related entities such as WDM Limited subsequent to Mr. Dyrud's retirement on 31st December 2006.
- [9] After a full hearing an award was published by the arbitrator on the 2nd of November 2016 (amended on 9th May 2017) ("the Arbitration Award" or "Final Award").
- [10] In the Arbitration Award, the Tribunal held, at paragraph 307 under the rubric "Issue #18 What is the extent of the parties' respective liability for indebtedness of the related entities?" that any liability that Mr. Dyrud might have had was proscribed by virtue of clause 1.3 of the Partnership Withdrawal Agreement ("PWA") which the Tribunal had ruled to be effective and enforceable. Thus "...save and except for any such claim against the firm that falls within the

¹ Paragraph 16 of the Arbitration Award.

² Paragraph 18 of the Arbitration Award.

parameters of Clause 1.3 of the PWA, it is held that [Mr. Dyrud] has no liability for the indebtedness of WDM [Limited].”

The Dispute

[11] Mitchell House was extensively damaged as a result of the passage of Hurricane Irma in September 2017. A claim was made on the policy of insurance covering the premises. That claim was settled for the sum of US\$241,371.89. The parties were unable to agree the manner in which the proceeds of the policy of insurance over the Property was to be applied. Ms. Webster proposed that the money should be used to pay down the debt of the former WDM Partnership to FCIB. Her position was that liability for the debt secured by a charge on Parcel 55 attaches to WDM Limited and that the Arbitration Award to the effect that she was responsible for the indebtedness of the WDM Partnership, did not pertain to this debt because it was owed not by the WDM Partnership but by WDM Limited. The arbitrator’s award was not concerned with the liability of WDM Limited.

[12] Mr. Dyrud objected on the basis that the debt owed to FCIB had been incurred by the WDM Partnership and not by WDM Limited. All relevant documents including the relevant Business Loan Agreement clearly showed that the liability for the indebtedness to the commercial bank was that of the WDM Partnership and not that of WDM Limited. WDM Limited was the primary obligor responsible for repayment of the debt owed to FCIB notwithstanding that its property had been used as security for its repayment the debt had been refinanced by Ms. Webster and that her firm Webster LP had contractually assumed responsibility to pay it and in any event, in the arbitration proceedings between them, the arbitrator had adjudged at paragraph 307 of the Final

Award that Ms. Webster was liable for the indebtedness of WDM Limited.

- [13] Mr. Dyrud maintained that WDM Limited's assets cannot properly exist for the purpose of discharging what is ostensibly the indebtedness incurred and/or assumed by Ms. Webster and Webster LP. He proposed instead that the insurance proceeds be used to repair Mitchell House.
- [14] In an effort to resolve that impasse Ms. Webster unsuccessfully sought leave to bring a derivative action against Mr. Dyrud on the basis that the parties were hopelessly deadlocked on that question.

The Winding Up Petition

- [15] In turn, Mr. Dyrud petitioned the court to exercise its jurisdiction under Section 217(1)(a)(ii) of the **Companies Act**³ of Anguilla ("**the Companies Act**") to order the winding up of WDM Ltd on the just and equitable ground. Section 217(1)(a)(ii) of the **Companies Act** provides:

"The Court may order the liquidation and dissolution of a company or any of its affiliated companies—

(a) upon the application of a shareholder, debenture holder, creditor, director or officer if the Court is satisfied that-

.....

(ii) it is just and equitable that the company be liquidated and dissolved."

The Decision of the lower court

- [16] The court determined that in the circumstances shown it was just and equitable to order the winding up of WDM Limited. Accordingly, the judge granted the petition and ordered that a liquidator be

³ Chapter C65 of the Revised Statutes of Anguilla 2014.

appointed for the purpose of dissolving WDM Limited in accordance with section 222 of the **Companies Act**.

- [17] In so ordering, the judge found that WDM Limited is, in substance, a quasi-partnership company. For many years the parties had engaged in financial dealings and transactions in partnership with each other primarily through the WDM Partnership which was the engine that drove their entire operation. They used various corporate entities to facilitate the operations of the businesses that they carried on in partnership. WDM Limited, was one such corporate vehicle.
- [18] Specifically, WDM Limited had been incorporated on 11th June 1999 for the purpose of acquiring and holding the Property, upon which is situated Mitchell House. That Property, which is the sole asset of WDM Limited was acquired by a loan obtained by the partnership from the National Bank of Anguilla Ltd for the stated purpose of purchasing the Property. Mr. Dyrud and Ms. Webster later agreed to vary the terms of the initial loan and WDM Limited had been a party to the revision agreement. The initial loans were however refinanced in 2005 with FCIB and again the loan agreement by which the initial debt was refinanced was executed by both Mr. Dyrud and Ms. Webster on 4th July 2005 in their capacities as partners of WDM.
- [19] The court rejected the proposition advanced on behalf of Ms. Webster that liability for the debt secured by a charge on Parcel 55 attaches to WDM Limited. On the face of the documentation the partners of WDM were primary obligors for repayment of the loan and WDM Limited as mortgagor incurred liability only with regard to the security.

[20] The court further held that, contrary to the contention of Ms. Webster, the arbitrator had been called upon to resolve and did purport to resolve disputes and differences that existed between [Ms. Webster and Mr. Dyrud] with respect to WDM, FATCL and related entities including WDM Limited. Indeed, the arbitrator had accepted that it would be impossible to wind up the affairs of the WDM Partnership without addressing indebtedness carried by those [related] entities for the benefit of the WDM Partnership. Pointedly, in relation to the related entities the arbitrator specifically noted that in furtherance to the 'related entities' claim, Mr. Dyrud had sought a decision in relation to Mitchell House, the office building of FATCL, which is owned by WDM Limited of which company Ms. Webster and Mr. Dyrud were each 50% shareholders. It was against that background and in that context that the arbitrator had determined that any liability that Mr. Dyrud might have had in relation to the indebtedness of the related entities was proscribed by virtue of clause 1.3 of the PWA which the Tribunal had found to have been agreed between Ms. Webster and Mr. Dyrud. For this reason, the judge held that the issue as to the parties' respective liabilities with regard to the debts of the WDM Partnership and related entities had been fully and finally determined by the arbitrator and that on the basis of that determination, Mr. Dyrud was not personally liable for the debts of the WDM Partnership.

[21] The learned judge concluded that the encumbrances created over the Property were incurred for the use and benefit of the WDM Partnership and that liability for the existing debts of that partnership lay with Ms. Webster only.

[22] Further the learned judge held that it would be just and equitable to order the winding up of the company because:

- (i) The company was in substance a quasi-partnership company and the relationship of mutual trust and confidence between the shareholders/quasi partners is now virtually nonexistent.
- (ii) Specifically, the parties were hopelessly deadlocked in respect of the application of the proceeds of the policy of insurance.
- (iii) The substratum upon which WDM Limited stood no longer subsisted. The company had been incorporated with the intention and on the understanding that it would be used as a vehicle to acquire and hold the Property for the benefit of the WDM Partnership so that the Property would be available to secure needed financing for the WDM Partnership. It was no longer possible for the company to fulfill this purpose because the WDM Partnership had been dissolved.

The Appeal

[23] Ms. Webster now appeals against the above decision of Innocent J on four grounds. Firstly, she argues that the learned judge erred in finding that the substratum of WDM Limited has gone. The Property of WDM Limited continues to be used to secure a debt obligation that had been incurred by Ms. Webster and Mr. Dyrud and was subsequently refinanced by Ms. Webster and part of the proceeds used to pay debts of the parties. She argues that the substratum continues to subsist. Ms. Webster continued the same law practice of the former law firm partnership between herself, and Mr. Dyrud

after Mr. Dyrud retired from it, with the benefit of the same banking credit facility that continues to be secured on the assets of WDM Limited; a winding up of WDM Limited would interfere with the subsisting commercial and/or contractual credit and security relationship between FCIB, WDM Limited and Ms. Webster.

[24] Secondly, Ms. Webster urges that the learned judge erred in rejecting (implicitly) her contention that Mr. Dyrud and herself were each personally liable for the indebtedness of the (now dissolved) WDM Partnership towards FCIB and that accordingly, both benefitted from the use of WDM Limited's property to secure that debt. She urges that the learned judge ought to have found that Mr. Dyrud was indeed personally liable for the law firm's indebtedness to third parties such as FCIB, but that as between Ms. Webster and Mr. Dyrud, Ms. Webster had assumed the liabilities of the law firm following its dissolution on 31st December 2006, when she continued its law firm practice. In this connection she contends that the learned judge misunderstood and misinterpreted the Arbitration Award between the parties when he found as a fact that the debts of WDM Limited fell within the scope of the arbitration and had been determined by the arbitrator. In fact, the arbitrator did not speak to the indebtedness of WDM Limited.

[25] Thirdly, Ms. Webster disputes the learned judge's characterization of WDM Limited as a quasi-partnership and cites the case of **Wang and others v Union Zone Management Ltd & Others**⁴ as authority for the proposition that the breakdown in the relationship between shareholders is not, in and of itself, justification for winding up a company. There must be something more. The breakdown must represent or lead to a deadlock between the shareholders in a

⁴ BVIHCMAP2013/0024 (delivered 12th January 2012, unreported).

general meeting. She urges that in the case under review the breakdown in the relationship between the shareholders had not resulted in a deadlock of the type which could justify a winding up order and challenges the decision of the learned judge to wind up the company on the basis of such a breakdown in trust and confidence.

[26] Fourthly, Ms. Webster contends that Mr. Dyrud, as a member of WDM Limited, has other remedies available to him if he is dissatisfied with the affairs of that company, that would not interfere with the credit and security relationship between FCIB, WDM Limited and Ms. Webster. It was open to him to seek an order for his shares in SIRL to be bought out.

[27] The following issues can be distilled by this Court for determination:

- (i) Whether WDM Limited was a quasi-partnership company.
- (ii) Whether there has been a breakdown in trust and confidence between the shareholders of the Company and if so, whether on the present facts such a breakdown could be sufficient to justify a winding up of WDM Limited.
- (iii) Whether the fact that the parties were deadlocked on the question of the application of the proceeds of the policy of insurance could be sufficient to justify an order for the winding up of WDM Limited; Whether the substratum of the company continues to subsist; and
- (iv) Whether there were any alternative remedies available to Mr. Dyrud.

Whether WDM Limited was a quasi-partnership company

[28] Underlying the decision of the learned judge and the basis for the exercise of his discretion in the instant case was his conclusion that WDM Limited was a quasi-partnership company. For this reason, I consider that aspect of the decision to be the logical starting point for any analysis of the issues raised in this appeal.

[29] In **Lau v Chu**⁵ the Privy Council relied upon and upheld the principles enunciated in **Ebrahimi v Westbourne Galleries Ltd (In re Westbourne Galleries Ltd)**⁶ the leading English case on whether a company is a quasi-partnership. In that case Lord Wilberforce had posited at pp 379—380 that:

"It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves."

[30] In my view the most important of the elements identified by Lord Wilberforce is the requirement that there be an association formed

⁵ [2020] 1 W.L.R. 4656.

⁶ [1973] AC 360.

or continued on the basis of a personal relationship, involving mutual confidence. It is the existence of a personal relationship with the necessary character of confidence that is the foundation for equitable obligations, and a factor which affects the conscience of a quasi-partnership's members, making it inequitable for them to rely on their strict legal rights. The requirement that there exists a relationship of "mutual confidence" has been described by Fancourt J in **Re Edwardian Group Limited**⁷ as being the necessary "substratum" of the equitable considerations present in a quasi-partnership.

[31] In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, courts should focus on the substance, not the form, of the parties' relationship.

[32] The case of **Croly v Good**⁸ is illustrative of the principle that in determining whether or not a company could be characterized as a quasi-partnership company or whether a petitioner was or had become a quasi-partner the court looks through the various legal entities used by the parties to structure their dealings, to the core elements of the underlying business relationship. In that case the court found that a company which had been formed as a commercial operation had subsequently become a quasi-partnership by reason of arrangements made between the shareholders concerning management of the company and remuneration of the petitioner shareholder. In arriving at his decision, the judge pointed out that one factor alone would not be sufficient to constitute a quasi-partnership. Thus: "...this is a

⁷ [2018] EWHC 1715 at [232].

⁸ [2011] B.C.C. 105.

question which requires an overall judgment on the totality of the arrangements made. No one element is conclusive either way."

[33] Having considered the authorities he found that the parties did not have to "articulate any feelings of trust and confidence", he held that there was no universal definition as to which companies fell into the quasi-partnership category. Although that concept developed from partnership law, it did not require that the company was entered into, or run, as if it were a partnership, or that the members regarded themselves as being partners. What mattered was whether the arrangements made between the parties amounted to or constituted an association formed or continued on the basis of a personal relationship, involving mutual confidence so as to justify the superimposition of equitable considerations on that relationship. This question required an overall judgment on the totality of the arrangements made and no element was conclusive either way.

[34] In the present case the common intention and understanding of Mr. Dyrud and Ms. Webster was to carry on the business of operating a law practice in partnership with each other using corporate vehicles to facilitate the operation of the partnership and of any businesses which they operated in connection therewith. WDM Limited was one such corporate vehicle; its purpose was to hold the Property at which premises the offices of the law firm and other ancillary operations of the partnership were located. It was clearly a quasi-partnership company because it was "...an association...continued on the basis of a personal relationship, involving mutual confidence or understanding". The understanding was that the two law partners and shareholders would use and participate in the management of the company as a vehicle to

facilitate the conduct of their partnership and the ancillary businesses. In furtherance of that arrangement WDM Limited was incorporated for the purpose of acquiring and holding the Property. The Property was used as collateral security for loans used to finance its acquisition as well as a location from which Ms. Webster's and Mr. Dyrud's law partnership, ancillary businesses and other aspects of their business ventures.

[35] It was submitted on behalf of Ms. Webster that Ms. Webster and Mr. Dyrud individually held and hold their shares in WDM Limited; their respective shares were and are not held jointly or in partnership and therefore no quasi-partnership existed. I do not see this as a material consideration. In my judgment there is no requirement for any specific documents or other arrangements for a company to be determined to be a quasi- partnership. Specifically, there is no requirement that shares in such a company be held jointly or in partnership. Whether or not the association between the shareholders of a company is a purely commercial one, the basis of which is exhaustively laid down in the articles on the one hand or involves a relationship of trust and confidence that could properly be characterised as a quasi-partnership on the other hand is a question of fact requiring an overall judgment on the totality of the arrangements made between them.

[36] I agree with the finding of the learned judge that WDM Limited was and had been operated by the parties as a quasi-partnership company. This had the effect of importing into their association additional equitable considerations beyond strict legal rights of the parties.

Whether there has been a breakdown in trust and confidence between the shareholders of the Company and if so, whether on the present facts such a breakdown could be sufficient to justify a winding up of the Company

[37] Ms. Webster does not deny that there has been a complete and irreversible breakdown in the relationship of trust and confidence between herself and Mr. Dyrud. Indeed, no evidence to the contrary was elicited before the court in the proceedings below. At paragraph 7 of his judgment the learned judge summarized the position as being that Mr. Dyrud and Ms. Webster were both in agreement that there existed a total and irretrievable breakdown of the business relationship of mutual trust, confidence and cooperation between them. Ms. Webster's position is that the admitted breakdown in trust and confidence between herself and Mr. Dyrud did not, in and of itself, provide justification for the winding up of WDM Limited because such breakdown had not resulted in any functional deadlock in the management of the company.

[38] In **Lau v Chu** Lord Briggs JSC explained at paragraphs [14] and [15]:

“14. A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level...

15. Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership.”

[39] His Lordship went on to explain at paragraph [17] that:

“17. The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding up may be ordered regardless of whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding up even where there may not be a complete functional deadlock. In the former case winding up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course, both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two-party quasi-partnership like the present.”

[40] The question for this Court in the present case was whether the former relationship of trust and confidence which had subsisted between Ms. Webster and Mr. Dyrud as shareholders in a two-party corporate quasi-partnership had so far evaporated as to justify the winding up of WDM Limited on the just and equitable ground, regardless of functional deadlock. The learned judge answered that question in the affirmative and, in my view there was abundant evidence before the court which entitled him to come to that conclusion.

[41] It is further argued on behalf of Ms. Webster that for a company to be wound up on just and equitable grounds based on a shareholder's lack of confidence in the management of its affairs, the alleged lack of confidence must be grounded on the conduct of the parties in relation to the company's business and affairs and not in regard to other matters.

[42] In **Lau v Chu**, Lord Briggs JSC explained at paragraph [23] that in the case of a conventional commercial company that is sought to be wound up, functional deadlock in its management is the material consideration: deadlock about other matters which do not render the company incapable of being effectively managed was unimportant. With regard to companies which are found to be corporate quasi-partnerships however, different considerations apply. His Lordship explained at paragraph [25] that:

“25. Where the subject company is a corporate quasi-partnership, the position is otherwise. What matters is the relationship between the quasi- partners, and the extent to which the necessary basis of trust and confidence has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant.”

[43] For this reason, I do not accept the submission made on behalf of the Ms. Webster that the evidence placed before the court concerning the breakdown in the relationship of trust and confidence between Ms. Webster and Mr. Dyrud could not be sufficient to justify the court granting an order for the winding up of the company on the just and equitable ground.

Whether the fact that the parties were deadlocked on the question of the application of the proceeds of the policy of insurance could be sufficient to justify an order for the winding up of the Company

[44] The judge also found that there was deadlock in the management of the Company which could justify an order for the winding up of WDM Limited on the just and equitable ground. The evidence before the court was that Mitchell House, the sole asset of WDM Limited had sustained extensive damage resulting from the passage of Hurricane Irma in September 2017. The sum of US\$241,371.89 had been recovered on a claim made on the policy

of insurance covering the premises. Ms. Webster and Mr. Dyrud have been unable to reach agreement on the question of how the proceeds of the policy of insurance were to be applied.

[45] It is clear from the judgments in **Lau v Chu** that in the context of quasi-partnership companies, the concept of 'deadlock' extends beyond the operability or efficacy of procedures for the management of the company and may in appropriate circumstances encompass an inability of the quasi-partners to agree upon matters concerning important aspects of the direction of its business and assets. In that case Kaye J at first instance, had found that OSL had been set up by Mr. Chu and Mr. Lau on the basis that each of them would participate in their various ventures, whether carried on by it or indirectly through subsidiaries or affiliated companies. There was nothing in the articles of the company which gave Mr. Lau the right to participate in management. The company had however been found to be a quasi-partnership company and the judge inferred that one of the equitable obligations owed to Mr. Lau was the right to so participate. He found that Mr. Chu had employed various improper stratagems to make it effectively impossible for Mr. Lau to take part in significant aspects of the management of the company's businesses; that exclusion was in breach of the equitable obligations which Mr. Chu owed to Mr. Lau and that accordingly it was just and equitable that OSL should be wound up.

[46] In reversing the Court of Appeal decision and restoring the decision of the trial judge, the Privy Council accepted that the practical exclusion of Mr. Lau from participation in consequential management decisions affecting the business and assets of the company constituted evidence of deadlock in the management of

the company because the parties were unable to agree on important aspects of the company's business and affairs. Thus, at paragraphs [33] to [36] of his judgment Lord Briggs JSC set out important aspects of the relevant company's business, assets and affairs which had been paralyzed or negatively affected by reason of the fact that the parties could not agree upon, or even discuss them. Lady Arden JSC acknowledged that the decision of the Board in **Ng Eng Hiam v Ng Kee Wei**⁹ had treated "deadlock" as being the inability of the company to function at board or shareholder level. She pointed out, however, that most cases involving quasi-partnership companies will be found to involve much more than complete deadlock at the level of management and often covered instances of failure to observe equitable obligations implied into the relationship between quasi partners. She found that the effective exclusion of Mr. Lau from participation in the management of the businesses had resulted in an inability of the parties to make decisions on important aspects of those businesses. Accordingly, she stated at Paragraph [93] that:

"Mr. Lau did not accept that he should be excluded from the management of the businesses. So, the situation developed in which the parties were unable to agree about OSL's business and in that sense, which is not the sense in which the Board used the term in *Ng Eng Hiam Hiam* 31 MLJ 238, there was deadlock."

- [47] This case clearly demonstrates that in circumstances where shareholders in a quasi-partnership company are unable or unwilling to agree upon important or consequential aspects of the company's business or affairs whether by reason of the breakdown of trust and confidence between themselves or for some other reason, the court may take that circumstance into account in deciding whether it should exercise its discretion to wind up the

⁹ (1965) 31 MLJ 238.

company on the just and equitable ground. There is no closed list of grounds for just and equitable winding up.¹⁰

[48] In the present case the inability of the two shareholders of WDM Limited to come to a decision upon as important and consequential a matter as whether damage to the sole property of the company should be repaired using the proceeds from insurance covering such damage, or whether the funds should be used for another purpose, is indicative of deadlock in the management of the company in that, the shareholders are unable to agree on important aspects of the company's business, assets and affairs. This circumstance could well justify a decision to wind up a corporate quasi-partnership on the just and equitable ground.

Whether the substratum of the Company continues to subsist

[49] As previously stated, it is argued on behalf of Ms. Webster that WDM Limited was incorporated for the purpose of being a corporate entity through which the parties would indirectly hold property jointly purchased by them. It was (and still is) essentially a holding company for the Property. The Property continues to be used to secure a debt obligation which had been incurred by the WDM Partnership. Ms. Webster asserts that after the retirement of Mr. Dyrud she continued the law practice formerly carried on by WDM partnership by means of a successor firm Webster LP. She did so with the benefit of the banking credit facility previously used by the former WDM Partnership which facility continues to be secured on the assets of WDM Limited. Thus, she says the substratum of WDM Limited continues to subsist.

¹⁰ See *Lau v Chu* [supra] per Lady Arden JSC at paragraph [101].

[50] An important premise of Ms. Webster's argument in this regard is that the debt secured by the Property is owed by Mr. Dyrud and Ms. Webster, the partners in WDM Partnership, an unincorporated entity. The point sought to be made is that both parties derive a benefit from the use of the Property to secure repayment of the loan as both are liable for repaying the same. In this connection, Ms. Webster says that the learned judge erred in exercising his discretion to wind up WDM Limited on the just and equitable ground in that in so doing he implicitly rejected Ms. Webster's contention that the law firm partnership WDM was an unincorporated entity and therefore that the partners (Ms. Webster and Mr. Dyrud) are personally liable to FCIB for repayment of the same.

[51] In this connection Ms. Webster contends that debts of WDM Limited did not fall within the scope of the arbitration or did not form part of the arbitrator's terms of reference. Thus, the arbitrator's finding that Ms. Webster was liable for the indebtedness of the WDM Partnership did not affect the liability of WDM Limited for the business loan from FCIB by means of which the Property was financed.

[52] In dealing with this issue the learned judge carefully reviewed the Arbitration Award. He noted that at paragraph 1 of the Arbitration Award the arbitrator stated his remit to be '...to resolve certain disputes and differences that exist between Mr. Dyrud and Ms. Webster with respect to WDM, FATCL and related entities.' He accepted the contention of Mr. Dyrud that '...given the interconnectedness of the WDM Partnership to the 'related entities', it would be impossible to wind up the affairs of the WDM Partnership without addressing [the] indebtedness carried by those entities for the benefit of the WDM Partnership.' He expressly noted

that ‘...in furtherance to the ‘related entities’ claim, [Mr. Dyrud] states that Mitchell House, the office building of FATCL, which is more particularly described as Registration Section South East; Block 78914B; Parcel 55 is owned by WDM [Limited]; [Mr. Dyrud] and [Ms. Webster] are each 50% shareholders.’ Thus, the arbitrator had been specifically requested to deal with the liability of the parties with respect to the Property in the context of the ‘related parties’ claim. In resolving the matter, the arbitrator at paragraph 307 of the Arbitration Award under the rubric ‘What is the extent of the parties’ respective liability for indebtedness of related entities?’ found as follows:

“The Tribunal accepts that any liability [Mr. Dyrud] may have is proscribed by virtue of Clause 1.3 of the PWA. Therefore, save and except for any such claim against the Firm that falls within the parameters of Clause 1.3 of the PWA, it is held that the Claimant has no liability for the indebtedness of WDM.”

- [53] I do not accept that the learned judge fell into error in dealing with this aspect of the case. It is clear from the Arbitration Award that the Tribunal purported to deal with the liability of Mr. Dyrud and Ms. Webster respectively for the repayment of debts incurred by the related entities including WDM Limited for or on behalf of the WDM Partnership. Among the matters specifically referred to the Tribunal in the context of the ‘related entities’ claim was the liability of the respective parties for the indebtedness of the ‘related entity’ WDM Limited with regard to Mitchell House which was its sole asset. There was no evidence before the Tribunal or before the court that WDM Limited had incurred any indebtedness on behalf of the WDM Partnership other than that it had mortgaged that Property as security for the loan obtained by the partners and refinanced by FCIB. Against that background the Tribunal had determined that

any liability that Mr. Dyrud might otherwise have had with respect to indebtedness of related entities (including WDM Limited) had been proscribed by the terms of the PWA agreed to between Mr. Dyrud and Ms. Webster. The judge had ample reason to conclude as he did that the issue concerning the parties' respective liability for the debts of the WDM Partnership and related entities had been fully and finally determined in arbitration between them.

[54] The evidence elicited in relation to the loan, particularly the documents produced for the purpose of recording the terms and arrangements for the loan showed unambiguously that the primary obligors of the loan for the purchase of the Property were Ms. Webster and Mr. Dyrud, the individuals constituting the WDM Partnership. WDM Limited was a secondary obligor to the extent that it had put up its property as security for the loan. Liability for repayment of the debt owed to FCIB which institution refinanced the loan was primarily that of the partners of WDM. The learned judge was justified in concluding that this circumstance notwithstanding, it had subsequently been established in arbitration proceedings conducted between the partners that upon its dissolution the liabilities of the WDM Partnership had been assumed by Ms. Webster.

[55] It is further argued on behalf of Ms. Webster that the learned judge should have found that Mr. Dyrud was indeed personally liable for the partnership's indebtedness to third parties such as FCIB, but that as between Ms. Webster and Mr. Dyrud, Ms. Webster had assumed the liabilities of the partnership following its dissolution on 31st December 2006, when she continued its law firm practice. The argument seems to be that although, as between Ms. Webster and Mr. Dyrud, Ms. Webster had assumed the liabilities of the

partnership by agreement, Mr. Dyrud had nonetheless continued to be personally liable for the partnership's indebtedness to third parties such as FCIB. I do not see that this argument can assist Ms. Webster. It may well be that the PWA would not afford Mr. Dyrud a defense against any claim by a third party such as FCIB to the extent that he had assumed personal responsibility for the debt. If, however as found by arbitration, Ms. Webster had bound herself by contract with Mr. Dyrud to assume the liabilities of the partnership she is not in a position to assert otherwise in litigation between herself and Mr. Dyrud concerning such liability.

- [56] In arriving at his conclusion that the substratum of WDM Limited had gone, the judge found that that Company had been incorporated with the intention and on the understanding that it would be used as a vehicle to acquire and hold the Property for the benefit of the WDM Partnership. This involved the understanding that the Property would be available to secure needed financing for the WDM Partnership. It was no longer possible for the Company to fulfill this purpose because the WDM Partnership had been dissolved. After the dissolution WDM Limited had been repurposed to provide that facility to Webster LP the successor to the WDM Partnership. To that extent its substratum had gone, because WDM Limited could no longer serve the principal purpose for which the quasi-partners had agreed to use it. This is a tenable view of the matter with which the appellate tribunal will not interfere.

Whether there was any alternative remedy available to Mr. Dyrud

- [57] It is urged on behalf of Ms. Webster that the just and equitable winding up of a company should be a remedy of last resort and sparingly used in cases where the company is no longer viable due

to disputes between the parties. Ms. Webster urges that in this case, no evidence has been put before the court in relation to a dispute between the parties in relation to the companies in question. It seems to me that the insoluble impasse between Ms. Webster and Mr. Dyrud as to the application of insurance proceeds recovered on a claim made for damage to WDM Limited's property is a strong indication that the company is no longer viable because its shareholders are unable to agree on important aspects of its business, assets and affairs.

- [58] Ms. Webster's position is that Mr. Dyrud as a member of WDM Limited has other remedies available to him that would not interfere with the subsisting credit and security relationship, of WMD Limited. She suggests that he could seek an order for his shares in WDM Limited to be bought out. She points out that winding up of a company kills the company and, if a less draconian form of relief is available, the court should favour that over a winding up order.

Burden of proof that Mr. Dyrud unreasonably failed to pursue an alternative remedy

- [59] In **Lau v Chu** at paragraphs [20] to [21] per Lord Briggs JSC, the Privy Council held that the legal burden of proof is on the petitioner to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available. If the petitioner can so establish, then the legal burden of proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

- [60] In the instant case Mr. Dyrud has shown to the satisfaction of the court that WDM Limited is a corporate quasi-partnership and that

an irretrievable breakdown in trust and confidence has occurred between its members. He has further shown that the parties are irreconcilably deadlocked on an issue of vital concern to the company, that is, on the question of the application of the proceeds of the policy of insurance recovered on a claim for damage to its property. He has also shown that the substratum of that company has gone, in that, the WDM Partnership having been dissolved it is no longer possible for that company to hold the Property for the benefit of the WDM Partnership. Accordingly, he has shown an entitlement to some form of relief. Moreover, in the absence of any reasonable alternative remedy, these facts could entitle him to an order for the winding up of the Company on just and equitable grounds.

[61] It is for Ms. Webster to show that in the circumstances under review Mr. Dyrud has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

[62] The only alternative remedy suggested by Ms. Webster's counsel is that it was open to Mr. Dyrud to realize his investment by selling his shares on the open market. In **Lau v Chu**, Lord Briggs, JSC noted at paragraph 49 that:

“It might in the Board's view be an answer to a case based purely on functional deadlock that a member could extract himself by a sale of his shares, but only if he could be expected to be able to do so upon fair terms.”

[63] In considering this issue the court expressed the view that the sale of his shares on the open market is not a viable option open to Mr. Dyrud since the only asset owned by WDM Limited was heavily encumbered particularly with respect to debts that Ms. Webster was personally liable for. Given the evidence placed before him,

this was a conclusion which the learned judge was well entitled to arrive at, and this Court will not interfere.

Judge's exercise of discretion

- [64] Ms. Webster points to other considerations, such as the financial condition of WDM Limited and the cost and likely outcome of the liquidation process which she says would make a winding up order inappropriate. Notwithstanding that these matters had been raised before the trial judge he exercised his discretion to order the winding up of WDM Limited on the just and equitable ground. It is worth noting that in **Lau v Chu** Lord Briggs, JSC observed:

“20. It is well established that winding up is a shareholder’s remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word.”

- [65] An appellate court may interfere with the exercise of discretion by a trial judge only in circumstances in which:¹¹

“... the appellate court is satisfied (1) that in exercising his ...judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

Disposition

¹¹ See *Dufour and Others v. Helenair Corporation Ltd and Others* (1996) 52 WIR 188 at 190-191 per Sir Vincent Floissac CJ.

[66] I would order that the appeal be dismissed with costs of the appeal to be paid by the appellant to the second respondent. Such costs are to be assessed if not agreed within 28 days of the date of this judgment.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar